

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

NU-WAY HOMES, INC., a Michigan  
corporation, and JOHN DINOTO, an  
individual,

Plaintiffs,

vs.

Case No. 2005-0069-CH

THE CHARTER TOWNSHIP OF  
CLINTON, a Michigan municipal  
corporation,

Defendant.

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OPINION AND ORDER

Plaintiff Nu-Way Homes, Inc., ("Plaintiff"), has filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant requests the Court deny Plaintiff's motion.

Plaintiff is an interest holder of a parcel of vacant real property located within Defendant's border, situated east of Little Road, and north of Cass Avenue. The property consists of 10.563 acres, and has been zoned as R-5, single-family residential, according to Defendant's master plan.<sup>1</sup> In 2004, Plaintiff submitted a petition to Defendant for rezoning of the property from one-family residential homes, to multiple family residential homes. On May 13, 2004, a public hearing on Plaintiff's rezoning request was scheduled before Defendant's planning commission ("the Township Planning Commission"). Upon conclusion of the public hearing, the Township Planning Commission voted for denial of the rezoning request. Plaintiff's

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<sup>1</sup> The Court will refer to this property as "the property".



rezoning petition was then scheduled with Defendant's Township Board, who voted to deny the rezoning request.

Plaintiff thereafter dropped its plan for multiple family residential homes, and submitted a new site development plan for the construction of single-family residential homes in accordance with the applicable zoning designation. Plaintiff's plan, Paul Brohneth Site Condominiums ("Plaintiff's Condominium Plan"), called for forty-three 1,200 square foot condominium units with detached garages and driveways. On July 19, 2004, the Township Planning Commission found Plaintiff's Condominium Plan was in basic compliance with the requirements of the Clinton Township Planning and Zoning Code, and recommended approval of the site plan upon Plaintiff adding landscaping and making the homes brick on the first floor. On November 8, 2004, the Township Board denied Plaintiff's Condominium Plan for the property.

Plaintiffs filed their complaint against Defendant on January 5, 2005. Plaintiffs' complaint alleges a violation of substantive due process in count 1; a taking in violation of the state constitution in count 2; state equal protection in count 3; and requests mandamus and declaratory relief in count 4.

Plaintiff contends that summary disposition is appropriate under MCR 2.116(C)(10) for its claims for substantive due process and equal protection. Plaintiff contends that the Township Board's denial of Plaintiff's Condominium Plan was not based upon competent, material, and substantial evidence on the whole record. Plaintiff contends that the Township Board had only a ministerial function to perform in the granting of development plans, and its denial contrary to the recommendation of the Township Planning Commission was improper. Plaintiff contends in the alternative that the Township Board's site plan review powers are narrowly tailored and that its decision to deny Plaintiff's Condominium Plan was an abuse of discretion. Plaintiff also

contends that the Township Board's denial of its plan was different from others similarly situated and that there was no rational basis for the differential treatment. Defendant responds by arguing that the Township Board's decision was in compliance with the standards set forth in Michigan's enabling legislation.

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue with respect to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. *Id.* Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Id.* Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.*, at 363. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. *West v General Motors Co*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The Court will first address Plaintiff's argument that a question of fact does not exist that the Township Board's review should be ministerial. In *Hessee Realty, Inc v City of Ann Arbor* 61 Mich App 319, 324-325; 232 NW2d 695 (1975), the Court held that laws regulating land use

must be considered in the context of what is often a conflict between two significant rights: (1) the right of a landowner to utilize his land as he desires and (2) the right of the state, through its political subdivisions, to guarantee that an individual's land use is consistent with the public good. Municipalities are given great breadth in establishing general land use patterns through their power to zone. *Id.*, at 325. To preserve the property owner's right, the municipality's ability to regulate specific uses which the zoning scheme allows, through site plan approval and building permit issuance, must be carefully circumscribed by specific, published standards. *Id.* Since the ruling in *Hessee*, Michigan's legislature enacted MCL 125.286e, which provides in pertinent part:

(2) A township may require the submission and approval of a site plan before authorization of a land use or activity regulated by a zoning ordinance. The zoning ordinance shall specify the body, board, or official charged with reviewing site plans and granting approval.

\* \* \*

(4) The procedures and requirements for the submission and approval of site plans shall be specified in the zoning ordinance. Site plan submission, review, and approval shall be required for special land uses and planned unit developments. Decisions rejecting, approving, or conditionally approving a site plan shall be based upon requirements and standards contained in the zoning ordinance, other township planning documents, other applicable ordinances, and state and federal statutes.

(5) A site plan shall be approved if it contains the information required by the zoning ordinance and is in compliance with the zoning ordinance and the conditions imposed pursuant to the ordinance, other township planning documents, other applicable ordinances, and state and federal statutes.

Defendant's site plan review regulation provides in pertinent part:

(d) In process of reviewing the site plan, the Planning Commission shall consider:

(1) The location and design of driveways providing vehicular ingress and egress to and from the site, and acceleration, deceleration and by-pass lanes in

relation to thoroughfares giving access to the site and in relation to pedestrian traffic; and

- (2) The traffic circulation features within the site and the location of vehicular parking areas.
- (e) The Planning Commission may make such requirements with respect to any matters as will assure:
  - (1) Safety and convenience of vehicular and pedestrian traffic both within the site and in relation to access thoroughfares.
  - (2) Satisfactory and harmonious relationships between the development on the site and the existing and prospective development of contiguous land and adjacent neighborhoods.

The Court is satisfied that Plaintiff has failed to establish that a question of fact does not exist regarding the Township Board's review as being ministerial in nature. Defendant's regulation specifically allows the planning commission to make requirements to assure the harmonious relationships between the development on the site and the existing development of contiguous and adjacent neighborhoods. The language appears to be discretionary in nature based upon the term "may" in the regulation.

The Court is also satisfied that Plaintiff has failed to establish that a question of fact does not exist that the Township Board's denial of its development plan was arbitrary. Defendant has provided evidence to suggest that Plaintiff's Condominium Plan was rejected based upon the lack of commitment to have the homes brick on the first floor, and that the homes would not fit into the area based upon the density of the homes resulting in a depreciation of values for surrounding properties. This does not appear to be an arbitrary decision as based upon the surrounding neighborhoods located within Defendant's boundaries. Plaintiff's reliance upon the density of the neighborhood located east of the development is not warranted since they are located within a neighboring city, Mt. Clemens. It appears that the neighborhoods adjacent to

the property within Defendant's boundaries consist of housing that is of a lower density. Consequently, Plaintiff's motion for summary disposition based upon a violation of substantive due process should be denied.

The Court is further satisfied that Plaintiff has failed to establish that a question of fact does not exist as to its claim that it was treated differently than similarly situated persons. Plaintiff's comparison to the Emerald Oaks development does not appear to be warranted as Plaintiff has failed to meet the requirements set forth by the planning commission for the approval of its development. Consequently, Plaintiff's motion for summary disposition should be denied.

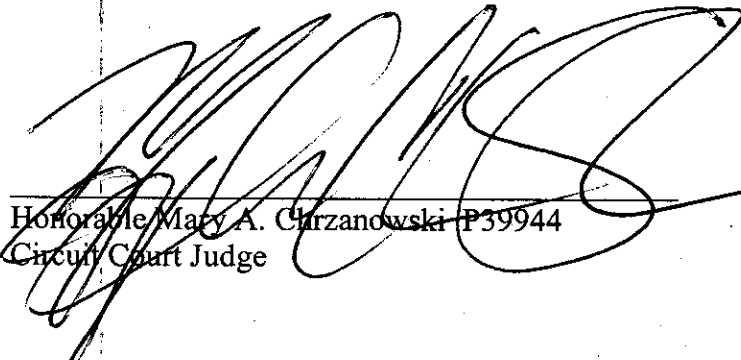
Based upon the reasons set forth above, Plaintiff's motion for summary disposition is DENIED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case. This matter is set for trial on **TUESDAY, JULY 18, 2006, AT 8:30 A.M.**

IT IS SO ORDERED.

Dated: **MAY 30 2006**

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Honorable Mary A. Chrzanowski P39944  
Circuit Court Judge

A TRUE COPY

**Carmella Sabaugh**  
COUNTY CLERK

BY   
DEPUTY CLERK